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CLERK, U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

SAMY ABDOU,

Plaintiff,

vs.

ALPHATEC SPINE, INC.,

Defendant.

CASE NO. 12-CV-1804 BEN (RBB)

**ORDER GRANTING REQUEST  
FOR ENTRY OF JUDGMENT**

[Docket No. 112]

On November 28, 2014, Defendant Alphatec Spine, Inc. filed a Request for Entry of Judgment. (Docket No. 112.) The motion lacked a hearing date, but briefing on the motion proceeded. Plaintiff Dr. Samy Abdou filed an Opposition on December 3, 2014 and Alphatec filed its Reply on December 8, 2014. (Docket Nos. 113, 115.) This would generally have provided the Court with complete briefing on a motion, however, Dr. Abdou then filed a Response to Alphatec's Reply. (Docket No. 117.) Then, on December 30, 2014, Alphatec filed a Notice of Recent Court Decision consisting of one paragraph drawing this Court's attention to a recent Federal Circuit decision. (Docket No. 117.) Dr. Abdou then filed a one page brief attempting to distinguish this case from the recent decision. (Docket No. 118). The Court considers the motion more than fully briefed and **GRANTS** the request for entry of judgment.

Alphatec's motion for summary judgment asked the Court to "grant summary judgment that claims 1, 3-6, 8-35 of [United States Patent No. 7,951,153] the '153

1 Patent and claims 6-29, 32-42 of [United States Patent No. 8,172,855] the '855 Patent  
2 are indefinite under 35 U.S.C. § 112, ¶ 2.” These are all the claims Dr. Abdou asserts  
3 that Alphatec infringed in this action. Although the parties’ briefing, and  
4 correspondingly the Court’s decision, did not explicitly and individually address every  
5 single dependent claim, the Court granted Alphatec’s motion. (Docket No. 111.)

6 Ignoring the breadth of Alphatec’s granted motion for summary judgment, Dr.  
7 Abdou now argues that Alphatec is only entitled to an entry of judgment as to the  
8 independent claims it provided individual and substantial argument on. In doing so,  
9 Dr. Abdou essentially attempts to do now, what he could have done in opposition to  
10 summary judgment.<sup>1</sup> He argues that the asserted dependent claims are not indefinite  
11 because these claims might provide greater specificity than the indefinite independent  
12 claims.

13 Having considered the parties’ briefing on the issue now, it is unlikely this  
14 argument would have succeeded on summary judgment because the dependent claims  
15 are no more definite than the independent claims from which they depend. But, the  
16 Court need not address it because now is not the time to make that argument.  
17 Additionally, the Court was not required to explicitly address every individual claim  
18 in its decision. *See Content Extraction and Transmission LLC v. Wells Fargo Bank,*  
19 *National Association*, 2012 WL , \*4 (affirming district court decision that did not  
20 address each claim and noting the Plaintiff’s failure to identify claims insufficiently  
21 addressed in its opposition brief).

22 The Court is mindful that parties are limited in the issues that can be explicitly  
23 briefed, particularly when many claims are at issue. Alphatec’s greater attention to the  
24 indefiniteness of the independent claims while moving for summary judgment on all  
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26  
27 <sup>1</sup>Dr. Abdou demonstrated an awareness of the significance of dependent claims  
28 in his argument on summary judgment as to provisional damages, arguing that the  
claims of the published application and issued patent were substantially identical if  
dependent claims were also considered. The same attention was not given to the  
dependent claims as to indefiniteness.

1 the asserted claims is likely an example of the challenges in allocating limited pages  
2 to many issues. However, Dr. Abdou could have argued that Alphatec failed to address  
3 or carry its burden as to certain asserted dependent claims with or without substantial  
4 argument. But he did not and he is not entitled to raise that argument after the Court  
5 has granted Alphatec's motion for summary judgment as to all the asserted claims.

6 Alphatec's request for entry of judgment is **GRANTED**. The Clerk shall enter  
7 judgment in favor of Alphatec as set forth in the Court's November 19, 2014 Order  
8 granting Alphatec's motion that claims 1, 3-6, 8-35 of the '153 Patent and claims 6-29,  
9 32-42 of the '855 Patent are indefinite under 35 U.S.C. § 112, ¶ 2.

10  
11 **IT IS SO ORDERED.**

12  
13 DATED: 2/2/15

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HON. ROGER T. BENITEZ  
United States District Judge